Supreme Court, U.S.
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(1)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

TYRESE WILLIAMS,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

Petition for Writ of Certiorari to the
Illinois Appellate Court, First District

PETITION FOR WRIT OF CERTIORARI

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17 pp

QUESTION PRESENTED

PETITIONER'S RIGHT TO HAVE DNA ANALYSIS CONDUCTED ON A PARTIALLY-SMOKED CIGAR, IS PROTECTED BY DUE PROCESS, WHERE THE RESULTS OF SAID TESTING COULD TEND TO CORROBORATE PETITIONER'S TRIAL TESTIMONY AND DEFENSE.

UNDER THESE CIRCUMSTANCES DOES THE STATE HAVE ANY RIGHT TO PROHIBIT PETITIONER FROM HAVING DNA ANALYSIS PERFORMED, AND WAS PETITIONER DENIED DUE PROCESS BY THE ILLINOIS COURTS' ABUSE OF DISCRETION IN PROHIBITING SUCH DNA TESTING?

PARTIES INVOLVED

In the appeal proceedings from the judgment entered in the Circuit Court of Cook County, Illinois:

Petitioner, Tyrese Williams, was the Appellant in the Appellate Court of Illinois, First District.

Respondent, People of the State of Illinois, was the Appellee in the Appellate Court of Illinois, First District.

* * *

Petitioner Tyrese Williams was the petitioner in the Petition For Leave To Appeal, denied by the Illinois Supreme Court.

Respondent, People of the State of Illinois, was the respondent in the Petition For Leave To Appeal, denied by the Illinois Supreme Court.

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UNDER THESE CIRCUMSTANCES THE STATE SHOULD HAVE NO RIGHT TO PROHIBIT PETITIONER FROM HAVING DNA ANALYSIS PERFORMED, AND PETITIONER WAS DENIED DUE PROCESS BY THE ILLINOIS COURTS' ABUSE OF DISCRETION IN PROHIBITING SUCH DNA TESTING.....7

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PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

Petitioner, Tyrese Williams, prays that a writ of certiorari issue:

to the Appellate Court of Illinois, First District, to review its Order denying petitioner the right to conduct DNA testing on certain physical evidence.

Orders Below

The following Orders are all contained in the Separate Volume Appendix to this Petition:

The unpublished Order of the Illinois Appellate Court, First District, People v. Williams, No. 1-00-0570, April 15, 2002, affirming petitioner's conviction and sentence, and denying petitioner the right to conduct DNA testing on certain physical evidence, is set out at Appendix C, pp. App. 3-19.

The unpublished Order of the Illinois Appellate Court, First District, People v. Williams, No. 1-00-0570, entered June 10, 2002, denying petitioner's Petition for Rehearing, is set out at Appendix B, p. App. 2.

The unpublished Order of the Illinois Supreme Court, People v. Williams, No. 94136, entered October

2, 2002, denying petitioner's Petition For Leave to Appeal, is set out at Appendix A, p. App. 1.

Jurisdictional Statement

The Order sought to be reviewed was entered by the Appellate Court of Illinois, First District, on April 15, 2002. (App. C, p. App. 3) The Appellate Court of Illinois, First District, denied the Petition For Rehearing on June 10, 2002. (App. B, p. App. 2) The Illinois Supreme Court denied leave to appeal on October 2, 2002. (Appendix A, p. App. 1)

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Constitutional Provision Involved

The federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Statement of Facts

Petitioner (then, defendant) was convicted in a bench trial of possession of controlled substance with

intent to deliver (400 grams or more but less than 900 grams of a substance containing cocaine) and sentenced to 12 years in prison. (C 68)

At the trial, two Harvey Police Officers testified that petitioner was a passenger in a car stopped for traffic offenses. (R 12-13, 31, 62-63, 70-79) Sherone Watkins, the driver, was taken into custody for having a suspended license. (R 63, 74-75)

The police officers testified they observed a small bag of cannabis sticking out of petitioner's pants pocket, so they seized the bag and arrested petitioner. (R 15-16, 33-39, 41-48) The police then searched petitioner, and claimed to have found several bags containing about 500 grams of cocaine, in the front of petitioner's pants. (R 17-27, 48-49. 86-91)

Petitioner testified that the police found a bag in the car which contained cigar paper and leaves. (R 107-08) Petitioner had no cocaine on his person, and he never saw any cocaine. (R 108-10) At the police station, the police displayed a grocery bag, and said, "Look what we found" in the squad car, under the seat. (R 112)

After being found guilty, petitioner filed post-trial motions via new counsel, including a motion to produce the cannabis allegedly seized from petitioner, because the laboratory reports note a partially-smoked cigar being in the bag, a detail never mentioned by the

police. (R 19, 158)

Over the State's objection, the bag of cannabis with the cigar inside was produced for examination, after which the trial court denied petitioner's motion for DNA testing on this cigar. (R 182-89)

On direct appeal petitioner raised several issues, including the alternative argument that if petitioner's conviction was not reversed, then petitioner should be permitted to have DNA analysis conducted on the cigar found in the bag of cannabis. (Petitioner's Appellate Brief, Point 6; Petition For Leave To Appeal, Point 1.)

The Appellate Court of Illinois, First District, denied petitioner the right to conduct DNA testing of the cigar found in the bag of cannabis, stating:

> "Here, defendant has failed to establish the significance of scientific testing of the cigar with regard to his claim of actual innocence. Defendant's identity was not at issue . . . . [T]he trial court properly denied defendant's motion because scientific testing of the cigar would not have produced any relevant information as to defendant's guilt or innocence." (Appendix C, pp. App. 18-19)

Petitions for rehearing and leave to appeal were subsequently denied. (App. A, B; pp. App. 1, 2)

Petitioner prays that a writ of certiorari issue to review the Order denying petitioner the right to conduct DNA testing on the cigar found in the bag of cannabis.

RAISING THE FEDERAL QUESTION

The federal question relative to DNA analysis was raised by petitioner in the trial court, the Illinois Appellate Court, and Illinois Supreme Court.

Petitioner's post-trial motion for DNA analysis was couched and argued in federal due process terms. (R 162-69; 172-89; C 59)

In the Appellate Court of Illinois, First District, petitioner raised the issue of DNA analysis at Point 6 of petitioner's Brief. Federal due process was argued in said Point, with federal cases cited in support thereof.

In the Supreme Court of Illinois, petitioner raised the issue of DNA analysis at Point 1 of petitioner's Petition For Leave To Appeal. Federal due process was argued in said Point, with federal cases cited in support thereof.

REASONS FOR GRANTING CERTIORARI

PETITIONER'S RIGHT TO HAVE DNA TESTING CONDUCTED ON A PARTIALLY-SMOKED CIGAR, IS PROTECTED BY DUE PROCESS, WHERE THE RESULTS OF SAID TESTING COULD TEND TO CORROBORATE PETITIONER'S TRIAL TESTIMONY AND DEFENSE.

UNDER THESE CIRCUMSTANCES THE STATE SHOULD HAVE NO RIGHT TO PROHIBIT PETITIONER FROM HAVING DNA ANALYSIS PERFORMED, AND PETITIONER WAS DENIED DUE PROCESS BY THE ILLINOIS COURTS' ABUSE OF DISCRETION IN PROHIBITING SUCH DNA ANALYSIS.

The Illinois courts seem to be forgetting that we have an adversarial form of justice in our country.

The State is not the exclusive owner of physical items, received in evidence at a criminal trial. The bag of cannabis with the cigar inside, is an exhibit received in evidence at this trial. (R 182-89)

What right does the State have to prohibit petitioner from having DNA testing conducted? Indeed, what interest does the State have in suppressing the truth? If the State wanted to conduct DNA testing on that evidence, or any other evidence in

its crime labs, the State would most likely proceed to do so without seeking permission or approval from anyone.

We are not talking about admissibility, or relevance. We are talking about the testing of evidence only.

The Appellate Court's conclusion that there could be no "significance" to this evidence, is irrational. (App. C, pp. App. 18-19)

The police testimony, and petitioner's testimony, were diametrically opposed. Either the police were lying, or petitioner was lying.

A trial is a search for the truth. United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677, 684 (1984).

If petitioner's DNA is not on the partially-smoked cigar, that fact would tend to corroborate petitioner's testimony that the bag of cannabis was not removed from petitioner's person, and these Harvey Police Officers are lying.

If the DNA on the partially-smoked cigar is that of the driver, Sherone Watkins, that fact would tend to corroborate petitioner's testimony, that the bag of cannabis was found in Sherone Watkins' car, not on petitioner's person, and these Harvey Police Officers are lying.

Petitioner's right to have this evidence analyzed, is protected by due process. "The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " Crane v. Kentucky, 476 U.S. 683, 690, 90 L.Ed.2d 636, 645 (1986). Every defendant charged with crime in the State courts has a federally protected constitutional right to present evidence in support of his defense. Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019 (1967). Indeed:

> "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers, supra, at 302, 35 L.Ed.2d at 312.

This cause should be remanded with directions that petitioner be permitted to have DNA analysis conducted upon the cigar found in the bag of cannabis.

With Illinois' track record concerning wrongful convictions,[1] it is shameful for the State to stymie petitioner here, in his efforts to establish his actual innocence.

The State should be agreeing to allow petitioner DNA analysis.

CONCLUSION

For all of the above reasons, certiorari should be allowed.

Respectfully submitted.

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Attorney for Petitioner

Dated: December 16, 2002

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1 The Appellate Court in its affirming Order (App. C, p. App. 9), relied on People v. Jimerson, 127 Ill.2d 12, 43-44 (1989) (affirming Jimerson's murder conviction and death sentence) -- which is noteworthy due to the fact that Mr. Jimerson was eventually exonerated and freed on the basis of DNA evidence.

(2)

Supreme Court, U.S.
FILED

02 9 57 DEC 17 2002

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

TYRESE WILLIAMS,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

Petition for Writ of Certiorari to the
Illinois Appellate Court, First District

SEPARATE VOLUME APPENDIX
PURSUANT TO SUPREME COURT RULE 14.1.(i)
RELATIVE TO:
PETITION FOR WRIT OF CERTIORARI

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1. The Order entered in conjunction with the judgment sought to be reviewed (Supreme Court Rule 14.1(i)(i)) –

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2. The Order entered in conjunction with the judgment sought to be reviewed (Supreme Court Rule 14.1(i)(i)) –

APPENDIX B: Order of the Appellate Court of Illinois, First Judicial District, entered June 10, 2002, People v. Williams, No. 1-00-0570, denying petition for rehearing.....App. 2

3. The Order entered in conjunction with the judgment sought to be reviewed (Supreme Court Rule 14.1(i)(i)) –

APPENDIX C: Order of the Appellate Court of Illinois, First District, No. 1-00-0570 , April 15, 2002, affirming petitioner's conviction and sentence.....App. 3

4. Material required by subparagraph 1(f) (Supreme Court Rule 14.1(i)(v)) –

APPENDIX D: The Due Process Clause of the Fourteenth Amendment to the United States Constitution.....App. 20

5. Material required by subparagraph 1(g)(i) (Supreme Court Rule 14.1(i)(v)) –

APPENDIX E: Raising the Federal Question.....App. 21

* * * *

APPENDIX A

94136 SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

October 2, 2002

Mr. Dennis Doherty
Attorney at Law
601 South LaSalle St., Suite 700
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No. 94136 - People State of Illinois, respondent, v. Tyrese Williams, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 2002.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
v.	)	No. 1-00-0570
TYRESE WILLIAMS,	)	
Defendant-Appellant.	)	

ORDER

Upon consideration of defendant-appellant's petition for rehearing,

IT IS HEREBY ORDERED that said petition for rehearing is DENIED.

ORDER ENTERED
JUN 10 2002
APPELLATE COURT,
FIRST DISTRICT

Presiding Justice
Judith Cohen

Justice William Cousins

Justice Jill K. McNulty

APPENDIX C

FIRST DIVISION
April 15, 2002

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-00-0570

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 98 C6 61478
TYRESE WILLIAMS,	)	Honorable George Morrissey,
Defendant-Appellant.	)	Presiding.

ORDER

Following a bench trial, defendant Tyrese Williams was convicted of possession of a controlled substance with intent to deliver and sentenced to a prison term of 12 years. On appeal, defendant contends that: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) he received ineffective assistance of trial counsel; and (3) the court erred in denying his motion for scientific testing of certain evidence.

Harvey police officer T. Brooks testified that at about 6:30 p.m. on July 21, 1998, he observed a vehicle obstructing traffic at 146th Street and Myrtle. Brooks stated that there were two individuals inside the vehicle and identified defendant as the passenger. Brooks stopped the vehicle, and moments later Officer Annette Avant arrived to assist Brooks. At that time, the driver informed Brooks that his driver's license was suspended and that *[p. 2]* the vehicle was uninsured. Brooks handcuffed the driver and put him in a police vehicle. Brooks then walked back to the stopped vehicle and asked defendant for a valid driver's license so that Brooks could release the vehicle to defendant. Defendant stated that he did not have a driver's license. Brooks then instructed him to exit the vehicle. As defendant exited the vehicle, Brooks noticed that "from his right pocket was a clear plastic bag with a green leafy substance sticking out of his pants." Brooks retrieved the bag from defendant's pocket, informed defendant that he was under arrest and

instructed Avant to handcuff defendant.

Thereafter, Brooks conducted an inventory search of the vehicle before it was towed. Brooks recovered a pager, cellular telephone, $4,000, and a scale with traces of a white powdery residue. Additionally, Avant recovered two plastic bags from defendant's person. Brooks secured the items in his vehicle.

On cross-examination, Brooks testified that the driver asked him to release the vehicle to defendant. Brooks told the driver that he would release the vehicle to defendant if he could produce a valid driver's license. He testified that defendant did not produce a driver's license but stated that he was from Texas.

Harvey police officer Annette Avant testified that at about 6:38 p.m. on July 21, 1998, she was dispatched to assist Officer *[p. 3]* in a traffic stop at 146th Street and Myrtle. When Avant arrived, she positioned herself at the passenger's side of the stopped vehicle while Brooks spoke to the driver. The driver was arrested after he informed Brooks that his license was suspended. Avant further testified that the driver asked Brooks to release the vehicle to defendant. Avant stated that Brooks walked back to the vehicle and asked defendant whether he had a valid driver's license. She stated that defendant was asked to exit the vehicle after he told Brooks that he did not have a valid driver's license. Avant stated that

she was standing by the bumper when defendant stepped out of the vehicle. Avant stated that Brooks was standing by the driver's side of the vehicle at that time. As defendant exited the vehicle, Brooks instructed Avant to "hook him up," which meant to place defendant under arrest. Meanwhile, Brooks approached defendant, retrieved the plastic bag from defendant's pocket and informed him that he was under arrest. Avant testified that she noticed a plastic bag "hanging out of the left pants pocket" as defendant stepped out. However, Avant admitted that she did not see the bag before Brooks instructed her to handcuff defendant.

The parties stipulated that Officers Avant and Brooks recovered and inventoried a plastic bag containing a green leafy substance (Item 1), a plastic bag containing four smaller bags of a white substance (Items 2-A, B, C, and D), and a plastic bag *[p. 4]* containing a white powder (Item 3). The parties further stipulated that a forensic scientist received the items in a sealed condition and that a proper chain of custody was maintained at all times. The parties stipulated that Item 1 was tested and determined to contain 1.7 grams of cannabis. Items 2A and 2B were tested and determined to contain 248.7 grams of cocaine. Items 2C and 2D weighed a total of 95.4 grams but no chemical analysis was performed. Lastly, Item 3 was tested and determined to contain 251 grams of cocaine.

Defendant, testifying in his own behalf, stated

that he lived with his father in Mesquite, Texas. He stated that on July 21, 1998, he went to visit his grandmother in Harvey, Illinois. He arrived at his grandmother's house at about 3:30 p.m. Shortly thereafter, defendant's cousin, Sherone Watkins, invited him to visit his girlfriend's apartment. Defendant agreed and the two drove to Watkins' apartment. After about 45 minutes, they left the apartment to drive back to their grandmother's house.

A few moments later, they were stopped by Officer Brooks. Watkins attempted to step out of the vehicle but Brooks instructed him to remain inside. Brooks approached the driver's side of the vehicle and asked Watkins for his driver's license. Meanwhile, Officer Avant arrived at the scene and stood by the passenger's side of the vehicle, where defendant was seated. Watkins was asked to step out of the vehicle after he said that *[p. 5]* he did not have a driver's license. As Brooks searched Watkins, Avant instructed defendant to exit the vehicle. Avant did not handcuff defendant but asked him to stand by the passenger's side door. According to defendant, Avant then reached behind the passenger's seat and retrieved a bag containing "cigar paper" and leaves. Defendant told Avant that the bag did not belong to him. Thereafter, Avant escorted defendant to the rear of the stopped vehicle and performed a pat-down search of defendant.

Defendant further testified that on that day he wore a red T-shirt and basketball shorts underneath

white windbreaker pants. He testified that he had about $160 and his Texas driver's license in his right pants pocket. According to defendant, Officer Avant asked whether he had a valid driver's license. Defendant responded affirmatively but denied being asked whether he wanted to drive the vehicle home. Defendant further denied that Avant found cocaine hidden in his pants and stated that only money was recovered from his person.

At the police station, Avant showed defendant a grocery bag and said, "Look what we found." According to defendant, he then overheard Avant tell an officer that she found the bag under the seat of her police car. Defendant stated that he was then strip searched by Officer Brooks.

In finding defendant guilty, the trial court expressly found the testimony of the officers to be credible. The court reasoned *[p. 6]* that the two officers did not work together as partners, that one was a community service officer and the other was a patrol officer. The court found that the officers testified truthfully and that their descriptions of the events were "straight forward".

On appeal, defendant first contends that he was not proved guilty beyond a reasonable doubt because there were defects in the chain of custody. In particular, defendant asserts that the evidence seized and inventoried did not match the evidence analyzed by the forensic scientist. Defendant argues that

Officers Avant and Brooks testified that a clear plastic bag containing 1.7 grams of cannabis was recovered from defendant's pocket, whereas the laboratory report indicated that the bag contained "1.7 grams of plant material and one cigar." Further, defendant notes that on cross-examination, Avant testified that she recovered a bag containing four separate bags of rocky substance, but on direct examination, she testified that she recovered a clear plastic bag containing three bags of white rocky substance and one bag of green leafy substance.

When a defendant challenges the sufficiency of the evidence, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Jimerson, 127 Ill. 2d *[p. 7]* 12, 43-44 (1989). We will not substitute our judgment for that of the trial court regarding witness credibility. People v. Digirolamo, 179 Ill. 2d 24, 46 (1997). Rather, it is the responsibility of the trier of fact to determine the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. People v Brisbon, 106 Ill. 2d 342, 360 (1985). A criminal conviction will not be set aside on review unless the evidence is so unlikely or inadequate that a reasonable doubt of defendant's guilt remains. Jimerson, 127 Ill. 2d at 43.

Here, the evidence, when viewed in the light

most favorable to the State, was sufficient to prove defendant guilty beyond a reasonable doubt. The discrepancies noted by defendant are not sufficient to create a reasonable doubt as the testimony of the officers was consistent with the results of the laboratory report. Any issues regarding the chain of custody were properly attributed by the trial court to weight and not admissibility. See People v. Herrero, 324 Ill. App. 3d 876, 883 (2001).

Additionally, defendant contends that the State failed to prove his guilt beyond a reasonable doubt because the testimony of the State's witnesses was inconsistent. Defendant asserts that the officers testified inconsistently as to where they were standing when defendant exited the vehicle and [in] which pants pocket the clear plastic bag containing a green leafy substance was *[p. 8]* first observed. The trial court acknowledged that the crux of this case was an issue of witness credibility and found the testimony of the officers to be credible. Despite the inconsistencies in the officers' testimony, a rational trier of fact could have found that defendant possessed a large amount of narcotics and that he intended to sell them. We will not substitute our judgment for that of the trial court.

Next, defendant contends that trial counsel was ineffective for: (1) failing to file a motion to quash arrest and suppress evidence; (2) failing to present readily available evidence to corroborate his testimony; and (3) stipulating to a defective chain of custody.

In Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2s 674, 104 S. Ct. 2052 (1984), the United States Supreme Court set forth a two–prong test to determine whether a defendant has been denied effective assistance of counsel: first, the defendant must show that counsel's representation fell below an objective standard of reasonableness and second, the defendant must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687, 60 L Ed.2d at 693, 104 S. Ct. at 2064. Moreover, in adopting Strickland, our supreme court observed that the defendant bears a heavy burden to overcome the strong presumption that counsel's actions were a matter of "sound trial strategy." People v. Albanese, 104 Ill. 2d 504, 525-26 (1984). *[p. 9]*

Defendant contends that trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence because the police did not possess the authority to ask for his identification. Trial counsel's failure to file a motion to suppress evidence is not per se incompetence. People v. Gierbolini, 128 Ill. App. 3d 794, 797 (1984). Generally, whether to file a motion to quash an arrest and suppress evidence is considered a matter of trial strategy, and a reviewing court "will not indulge in hindsight analysis to determine whether counsel's decision was adequate under the circumstances." People v. Rodriguez, 312 Ill. App. 3d 920, 925 (2000). Moreover, trial counsel may reasonably consider a motion to suppress to be futile where the arrest or search is proper; counsel is not obligated to file futile motions to render effective

assistance. People v. Robinson, 299 Ill. App. 3d 426, 435 (1998). Thus, to establish that trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence, the defendant must establish both that the motion would have been granted, and that the outcome of the trial would have been different had the evidence been suppressed. Robinson, 299 Ill. App. 3d at 434. Furthermore, a claim of ineffective assistance of counsel cannot be based on mere speculation. Gierbolini, 128 Ill. App. 3d at 797.

A defendant is lawfully stopped when he is a passenger in a *[p. 10]* vehicle stopped for a traffic violation. People v. Sorensen, 196 Ill. 2d 425, 433 (2001) (defendant passenger lawfully stopped where the officer observed a traffic violation). Moreover, an officer may order the driver and any passengers out of a lawfully stopped vehicle without raising fourth amendment concerns. Sorensen, 196 Ill. 2d at 433. This is true even where the officer does not suspect that the passenger has been involved in a crime. People v. Gonzalez, 184 Ill. 2d 402, 415 (1998).

Maryland v. Wilson, 519 U.S. 408, 137 L. Ed. 2d 41, 117 S. Ct. 882 (1997), is factually similar to the case at bar. In Wilson, an officer stopped a vehicle for traffic violations. The officer noted that the driver and the defendant, who was a passenger, appeared nervous. When the officer instructed the passenger to exit the vehicle, a bag of cocaine fell to the ground as he stepped out. The passenger sought to suppress the

evidence, contending that the officer ordered him out of the vehicle in violation of the fourth amendment. The Supreme Court held that a police officer, pursuant to a valid traffic stop, may order a passenger to step out of the vehicle even if he does not suspect that the passenger has been involved in any wrongdoing. Wilson, 519 U.S. at 413-14.

Here, similar to Wilson, the drugs were found "sticking out of" defendant's pants as he complied with the officer's lawful order to exit the vehicle. A motion to suppress would have been *[p. 11]* futile because the officer did not violate the defendant's fourth amendment rights by ordering him out of the vehicle.

Our holding does not conflict with our recent decision in People v. Bunch, No. 1-00-3245 (2002). There, the officer stopped the vehicle in which defendant was a passenger after observing a traffic violation. The officer instructed the defendant to exit the vehicle, and he complied. Unlike the case at bar, no evidence was recovered as a result of the defendant's compliance with the officer's demand to exit the vehicle. Instead, the officer then shined his flashlight on the defendant's face and asked the defendant his name and where he was coming from because the officer was "curious to find out exactly who [the defendant] was." When the defendant answered, the officer saw a small clear plastic object containing suspected drugs in the defendant's mouth. At that point, the officer arrested the defendant and ordered him to spit out the object which turned out to

be heroin. Relying on People v. Gonzalez, 324 Ill. App. 3d 15 (2001), leave to appeal allowed, No. 92305 (December 5, 2001), we reversed the denial of the defendant's motion to suppress on the basis that the officer had no authority to ask the defendant for identification. Here, it is clear that the contraband was recovered as defendant exited the vehicle pursuant to the officer's lawful request and not as a result of the officer's request for identification. *[p. 12]*

Next, defendant contends that his trial counsel was ineffective for failing to introduce defendant's Texas driver's license to corroborate his testimony that he had a driver's license on the day in question. However, defendant has failed to demonstrate that but for counsel's failure the result of the proceedings would have been different. The officers did not suspect defendant of any wrongdoing. Defendant was merely asked for his driver's license to determine whether he could drive the vehicle away. He was free to decline the officer's request for identification. Probable cause to arrest defendant did not arise until the officers saw a clear plastic bag containing green leafy substance in defendant's pants pocket. Showing that defendant actually had a driver's license would not have undermined the testimony of the officers to the extent that the outcome of the proceedings would have been different. We find no deficiency in trial counsel's performance. See People v. Kelley, 304 Ill. App. 3d 628, 635 (1999) (counsel's failure to investigate depends upon the significance of the evidence and the closeness of the case).

Additionally, defendant contends that he received ineffective assistance because his trial counsel failed to present seven character witnesses. We find defendant's claim to be wholly without merit. Counsel's decision whether to present certain witnesses is a matter of trial strategy and a reviewing court will not substitute its judgment absent a showing of *[p. 13]* substantial prejudice. People v. Bodoh, 200 Ill. App.3d 415, 423-24 (1990). Defendant has failed to demonstrate that his counsel's actions prejudiced him to the extent that the outcome of the proceedings would have been different. See Bodoh, 200 Ill. App.3d at 424 (lack of proffered testimony did not prejudice the defendant to the extent that the outcome of the trial would have been different). In light of the police officers' testimony and the drugs and paraphernalia recovered, testimony by character witnesses would not likely have changed the outcome.

Next, defendant contends that he received ineffective assistance because his trial counsel stipulated to a defective chain of custody.

"Generally speaking, a defendant is precluded from attacking or otherwise contradicting any facts to which he has previously stipulated." People v. Gibson, 287 Ill. App. 3d 878, 880 (1997).

Real evidence is admissible when a sufficient foundation is laid to establish that the item is the one involved in the alleged offense and is substantially unchanged since its seizure by authorities. People v.

Terry, 211 Ill. App. 3d 968, 972-73 (1991). However, where the evidence is not readily identifiable or is susceptible to alteration, the burden is upon the State to establish a chain of custody that is sufficiently complete to render it improbable that the item has been tampered with, *[p. 14]* exchanged, or contaminated. People v. Slaughter, 149 Ill. App. 3d 183 (1986). The rationale behind this rule is to connect the object to the defendant and the crime. People v. Lach, 302 Ill. App. 3d 587, 593 (1998).

A chain of custody requires proof of delivery, presence, and safekeeping. Gibson, 287 Ill. App. 3d at 882. To succeed, the State need not exclude every possibility of tampering. People v. Ziehm, 120 Ill. App. 3d 777, 782 (1983). Rather, the State need only demonstrate that reasonable protective measures were taken to maintain a chain of custody, and that it was probable the evidence was not altered or substituted. Lach, 302 Ill. App. 3d at 594. Significantly, absent any actual evidence of tampering or substitution, deficiencies in the chain of custody go to the weight and not the admissibility of the evidence. Lach, 302 Ill. App. 3d at 594. Even where there is a missing link in the chain of custody, evidence is properly admitted where testimony that sufficiently described the condition of the evidence when delivered matches the description of the evidence when examined. Bynum, 257 Ill. App. 3d at 510.

In our earlier discussion of the sufficiency of the evidence, we concluded that there was no defect in the

chain of custody. Defendant has therefore failed to establish that his trial counsel was ineffective for stipulating to the chain of custody. *[p. 15]*

Finally, defendant contends that the trial court erred in denying his posttrial motion for scientific testing of the cigar that was recovered based upon his claim of actual innocence.

Section 116-3 of the Code of Criminal Procedure of 1963 provides in pertinent part:

> ["] (b) The defendant must present a prima facie case that:
>
> (1) identity was the issue in the trial which resulted in his or her conviction; and
>
> (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.
>
> (c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination

that:

> (1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence; *[p. 16]*
>
> (2) the testing requested employs a scientific method generally accepted within the relevant scientific community." 725 ILCS 5/116-3 (West. 1998).

Concededly, section 116-3 is not limited to instances that would completely exonerate the defendant. People v. Savory, 197 Ill.2d 203, 214 (2001). However, section 116-3 requires that the evidence at issue be "materially relevant to the defendant's assertion of actual innocence." Savory, 197 Ill.2d at 214.

Here, defendant has failed to establish the significance of scientific testing of the cigar with regard to his claim of actual innocence. Defendant's identity was not at issue. Testimony indicated that a clear plastic bag was observed hanging out of defendant's pocket and that a subsequent search of the vehicle revealed a bag containing cigar paper and leaves. We find that the trial court properly denied defendant's motion because scientific testing of the

cigar would not have produced any relevant information as to defendant's guilt or innocence.

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.

McNULTY, J., with COHEN, P.J. and COUSINS, J., concurring.

APPENDIX D

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

U.S. Const., amend. XIV, Section 1:

> ". . . nor shall any State deprive any person of . . . liberty . . . without due process of law . . . ."

APPENDIX E

RAISING THE FEDERAL QUESTION

The federal question relative to DNA analysis was raised by petitioner in the trial court, the Illinois Appellate Court, and Illinois Supreme Court.

Petitioner's post-trial motion for DNA analysis was couched and argued in federal due process terms. (R 162-69; 172-89; C 59)

In the Appellate Court of Illinois, First District, petitioner raised the issue of DNA analysis at Point 6 of petitioner's Brief. Federal due process was argued in said Point, with federal cases cited in support thereof.

In the Supreme Court of Illinois, petitioner raised the issue of DNA analysis at Point 1 of petitioner's Petition For Leave To Appeal. Federal due process was argued in said Point, with federal cases cited in support thereof.

* * * *